"...the real question that arises in this case is whether the finding of the Commissioners that the respondent was resident and ordinarily resident in England is a finding of fact which cannot be disturbed, or whether it is open to examine the circumstances set out by the Commissioners for the purpose of seeing whether the conclusion they drew is one that this House will accept. The distinction between questions of fact and questions of law is difficult to define, but according to the respondent whether a man is resident or ordinarily resident here must always be a question of law dependent upon the provisions of an Act of Parliament. I find myself unable to accept this view. It may be true that the word 'reside' or 'residence' in other Acts may have special meanings, but in the Income Tax Act, it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning.

It is, of course, true that if the circumstances found by the Commissioners in the special case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact since there are no materials upon which that conclusion could depend. But if the incidents relating to visits in this country are of such a nature that they might constitute residence and their prolonged or repeated repetition would certainly produce that result then the matter must be a matter of degree, and the determination of whether or not the degree extends so far as to make a man resident or ordinarily resident here is for the Commissioners and it is not for the courts to say whether they would have reached the same conclusion."

"Residence" is defined under the Income Tax Ordinance, 1947 and to use the words of Lord Buckmaster at p. 247, "...it is essentially a question of fact whether a man does or does not comply with its meaning." Thus the most important thing to do is to construe the law in the light entirely of the facts of this case. I do not therefore propose to refer to all the cases which have been cited to me by Mr. Mooney and by that I do not mean to be disrespectful to the learned counsel. In the light of the definition of the word "resident", it would appear that, to be a resident in a place, an individual must first of all reside in that place. He may be absent from that place provided that such absences are temporary and reasonable and are not inconsistent with his claim to be resident in that place. It is true that a man may have more than one residence. [See *Levene* v. *Commissioners of Inland Revenue*(6)]. However, whether a person is resident in a place has always been a question of fact and the decision of the commissioners before whom the matter came on appeal, is final unless the courts decide there was no evidence on which the Special Commissioners could properly have come to the conclusion at which they arrived. [See *Robertson* v *The Federal Commissioner of Taxation*(7)]

In the present case, whether the incidents relating to the long absences were of such a nature that they could or could not be said to be temporary absences, and, if these absences were temporary, whether the absences were of such a nature that they were or were not reasonable or consistent or inconsistent with the appellant's claim to be resident in the States of Malaya in those years of assessment is, if I may borrow the words used by Lord Buckmaster, a matter of degree and whether the degree extends so far as to constitute these absences temporary, reasonable and consistent with the appellant's claim to be resident in the States of Malaya, is for the commissioners to determine, and it is not for this court to say whether it could have reached the same conclusion.

In the instant case, it is my view that the Special Commissioners who had all the material facts before them, reviewed the facts as a whole before arriving at a conclusion. It is therefore my considered judgment that the conclusion arrived at by the Special Commissioners is not open to review by this court and for that reason, I would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*

TAN KANG HWA v. SAFETY INSURANCE CO. LTD.

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.) November 27, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 36 of 1971]

Practice and Procedure — Appeal — Notice of appeal not served on plaintiff at time of filing — Second notice of appeal filed and served on plaintiff — First appeal struck out — Whether court functus officio — Federal Court (Civil Appeals) (Transitional) Rules, 1963, r. 6.

In this case the appellant had filed an appeal but at the time of filing the appeal he did not serve a notice thereof on the plaintiff. He asked the plaintiff for his consent to withdraw the appeal, but this was refused. The appellant thereupon filed a second notice of appeal and served a copy on the plaintiff. At the hearing of the appeals, the first appeal was struck out. It was then argued on behalf of the plaintiff that the court having struck out the first appeal, it was *functus officio* and had no jurisdiction to hear the second appeal. It was also argued that as the first appeal was pending, the appellant could not file the second notice of appeal without an order of the court. However it was argued that the notice of appeal should have been served on the first defendant in the case as he was "a party directly affected by the appeal".

Held: (1) the first appeal in this case had not been properly brought before the court and was a nullity and therefore the appellant could file the second notice of appeal;

(2) the first notice of appeal was not pending in this case, as it had never been served on the respondent;

(3) it was not necessary for the first defendant in this case to be served as the outcome of the appeal, whatever it may be could not make this position worse.

Cases referred to:-

(1) *Tan Ting Kok* v. *Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153.

(2) *In re Lamb* (1889) 23 G.B.D. 477.

(3) *Watson v. Cave, (No. 2)* (1881) 17 Ch. D. 23.

FEDERAL COURT.

David Tay for the appellant.

Edgar Joseph Jr. for the respondent.

Suffian F.J. (read by **Ong Hock Sim F.J.**): This is an appeal against a decision of the High Court.

Mr. Joseph for the respondent (plaintiff in the lower court) argues that we have no jurisdiction to hear this appeal.

To understand his arguments, it is necessary to give a brief history of the matter. On 16th March, 1971, the judgment appealed from was delivered in favour of the plaintiff against the two defendants. The second defendant was dissatisfied with it. On 29th March he gave notice of appeal under rule 6 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963. That appeal was given a number (31 of 1971) by the Registry. The second defendant did not, however, at the time of filing the notice of appeal serve a notice of the appeal on the plaintiff, as required by rule 7. Realising on the authority of *Tan Ting Kok* v. *Cheong Lep Keen & Anor.*[1] that his appeal would not therefore have been properly brought before the court, he wrote to the plaintiff asking for his consent to the withdrawal of the notice of appeal, so that he (the second defendant) could file a second notice. The plaintiff declined to give his consent. On 15th April, that is still within time, the second defendant filed a second notice of appeal. This time he served a copy on the plaintiff as required by rule 7. The Registry gave the appeal a second number, 36 of 1971.

When the matter first came up before us, there were thus two appeals, Nos. 31 and 36 of 1971.

On the second defendant's application, the first appeal was struck out without objection from the plaintiff. There then remains appeal No. 36.

It is argued by Mr. Joseph for the plaintiff that once the court has struck off the first appeal, it is *functus officio* and it has no jurisdiction to hear the second appeal. Mr. Joseph for the plaintiff cites in support *In re Lamb*[2] which he admits is not directly in point. I do not think that his argument is supported by that case, for there the appeal struck out had been properly brought before the court and the question was whether the court should restore it and enlarge the time for appealing. Here the appeal struck out had not been properly brought before the court and the second notice of appeal was given within time and there is no question of restoration and enlarging time. As the first notice was a nullity, there is no point in the second defendant applying for leave to file a fresh notice of appeal.

It is next argued that the second defendant cannot serve the second notice of appeal while the first notice is still pending without a court order granting him leave to withdraw the first notice, with liberty to file a second notice. *Watson* v. *Cave*[3] is cited in support. I do not think that that case helps the plaintiff either. There the appellant gave formal notice of his intention to withdraw his appeal, which notice was accepted by the respondent. Here the appellant asked the respondent to consent to the withdrawal of the notice of appeal and the respondent declined to consent. Also here there is no question of the first notice of appeal being still pending, as it has never been served on the respondent.

To understand the third argument, it is necessary to state briefly the nature of the dispute in this case. The plaintiff is an insurance company. It issued a policy in respect of the first defendant's car. The first defendant's car knocked down and injured an infant. The infant's father, the second defendant, sued the first defendant for damages in Civil Suit No. 1216/1968. Thereupon in a separate suit out of which this appeal arises the plaintiff sued the first and second defendants for a declaration that the policy was void. It won. The effect of the judgment obtained by it was that, if there was any liability in negligence for the accident, the first defendant is personally liable, not the plaintiff.

It is argued that the first defendant is a party "directly affected by the appeal" within the meaning of rule 7, that he also should have been served with the notice of appeal and that, as he has not been so served, this court is not competent to hear this appeal. I am of the opinion that the non-joinder is not fatal. The first defendant has shown no interest in these proceedings. In the lower court the writ had to be served on him by substituted service, because he could not be traced, and he never appeared at the trial. The judgment obtained by the plaintiff means that the first defendant, if found responsible for the accident, would have to pay damages out of his own pocket. The outcome of this appeal, whatever it may be, can never make his position worse. If the second defendant loses this appeal, the first defendant will still be personally liable. On the other hand, if the second defendant wins this appeal, it will be to the advantage of the absent first defendant, for in that event the plaintiff insurance company will be liable rather than the first defendant.

I would therefore rule that this court is competent to hear this appeal.

Azmi L.P. and **Ong Hock Sim F.J.** concurred.

Order accordingly.

Solicitors: *Murphy & Dunbar; Joseph & Son.*